

## Articles

# Framing Gender: Federal Appellate Judges' Choices About Gender-Neutral Language

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### Introduction

LANGUAGE IS CRITICALLY IMPORTANT in the two fields at the center of this Article. Language is the tool of the legal profession,<sup>1</sup> and feminists recognize that language has been an instrument of both women's oppression and their liberation.<sup>2</sup> This Article considers a question relevant to both fields: Are judges using gender-neutral language? For lawyers, the answer may inform their choice of wording when they write for judges.<sup>3</sup> For feminists, the answer will be one marker of the success of their efforts in language reform.

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1. See, e.g., FRANK E. COOPER, *WRITING IN LAW PRACTICE* 1 (1963) ("[L]awyers have but one tool—language."); DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW*, at vii (1963) ("The law is a profession of words."); Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 492 (1999) ("To provide competent representation, a lawyer must communicate effectively.").

2. ANNE PAUWELS, *WOMEN CHANGING LANGUAGE* 87 (1998) [hereinafter PAUWELS, *CHANGING LANGUAGE*] (stating that for those who would reform gender-biased language, "[l]anguage is seen as both an instrument of oppression and liberation").

3. See Judith S. Kaye, *A Brief for Gender-Neutral Brief-Writing*, N.Y. L.J., Mar. 21, 1991, at 2 (stating that using gender-biased language may annoy or alienate brief readers, including judges and their staffs).

In 1991, New York judge Judith Kaye wrote that her state's courts were making progress in adopting gender-neutral writing.<sup>4</sup> Two years later, Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court observed that although gender-neutral language had become widespread in legal academia, the courts were "lagging behind the academy" on that score.<sup>5</sup> But little data exists to quantify the accuracy of either statement.<sup>6</sup> This Article examines what courts are actually doing through an empirical study of federal appellate judges' use of gender-neutral language.

The first part of this Article provides background about the meaning of the terms *gender-biased* and *gender-neutral* and discusses the contemporary movement to promote gender-neutral language. The second part explains, through the viewpoints of language scholars, psychologists, framing theorists, and legal professionals, why gender-neutral language is important. The third part suggests methods for framing gender-neutral language. The fourth part presents the methodology and results of the study, analyzing language in recent court opinions and comparing data from the years 1965 and 2006. The final part discusses implications and conclusions.

## I. Gender-Neutral Language: Background

Consider this quotation:

One may be saddened but not surprised at the statement "man is the only primate that commits rape." . . . But "man being a mammal breastfeeds his young" is taken as a joke.<sup>7</sup>

This "joke" is humorous—or vexing—because it illustrates a quirk of the English language. Until recently, grammarians would have agreed that, in English, the masculine includes the feminine; that is, male-linked words can sometimes act as generics.<sup>8</sup> But the quo-

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4. *Id.*

5. Shirley S. Abrahamson, *Toward a Courtroom of One's Own: An Appellate Court Judge Looks at Gender Bias*, 61 U. CIN. L. REV. 1209, 1218 (1993) (recounting how both male and female speakers at the American Association of Law Schools conference often use gender-neutral language). *But see* Pat Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 667–68 (2007) (reporting data showing that law reviews, the authors of which are often members of legal academia, have made some progress toward adopting gender neutral language, but they have made less progress than judges and lawyers).

6. *See* Chew & Kelley-Chew, *supra* note 5, at 645 (noting the dearth of such data and reporting results of their recent study of several types of legal writing).

7. CASEY MILLER & KATE SWIFT, *WORDS AND WOMEN* 25–26 (1976).

8. Sandra Petersson, *Gender Neutral Drafting: Historical Perspective*, 19 STATUTE L. REV. 93, 102 (1998) (explaining that until recently, the generic "he" was taught to English

tation above illustrates that the masculine never did unambiguously include the feminine. Instead of including all persons, masculine "false generics"<sup>9</sup> reduce women "to the status of the 'subsumed,' the 'invisible,' or the 'marked' one[s]." <sup>10</sup>

Such false generics are one kind of gender-biased language. In this Article, *gender-biased language*, which is sometimes called *sexist language* or *exclusive language*, means language that represents the male as the norm,<sup>11</sup> gratuitously identifies the sex of a referent, or demeans or trivializes women.<sup>12</sup> Its opposite, *gender-neutral language*, sometimes called *nonsexist language*<sup>13</sup> or *gender-inclusive language*,<sup>14</sup> avoids gender bias. These definitions focus on bias in favor of the masculine because, although gender-biased language can be directed against

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speakers); Francine Wattman Frank, *Language Planning, Language Reform, and Language Change: A Review of Guidelines for Nonsexist Usage*, in LANGUAGE, GENDER, AND PROFESSIONAL WRITING: THEORETICAL APPROACHES AND GUIDELINES FOR NONSEXIST USAGE 105, 114–15 (Francine Wattman Frank & Paula A. Treichler eds., 1988) (discussing grammarians' rationale for prescribing sex-indefinite masculine pronouns).

9. CASEY MILLER & KATE SWIFT, *THE HANDBOOK OF NONSEXIST WRITING* 9, 12–13 (1980) (pointing out that women are overlooked through "false generics"); Anne Pauwels, *Linguistic Sexism and Feminist Linguistic Activism*, in *THE HANDBOOK OF LANGUAGE AND GENDER* 550, 553 (Janet Holmes & Miriam Meyerhoff eds., 2003) [hereinafter Pauwels, *Linguistic Sexism*] ("[W]omen are invisible in language when they are subsumed in generic expressions using masculine forms.").

10. Pauwels, *Linguistic Sexism*, *supra* note 9, at 553; see also DALE SPENDER, *MAN MADE LANGUAGE* 162 (2d ed. 1985) (stating that in English, "women have been encoded as invisible"); DEBORAH TANNEN, *GENDER AND DISCOURSE* 11 (1994) (stating that women and men have differing communication styles that "often put women in a subordinate position in interactions with men").

11. See Janet B. Parks & Mary Ann Robertson, *Explaining Age and Gender Effects on Attitudes Toward Sexist Language*, 24 J. LANGUAGE & SOC. PSYCHOL. 401, 402 (2005) (citing studies showing that "sexist language can suggest that the masculine is the norm and the feminine is the exception"); PAUWELS, *CHANGING LANGUAGE*, *supra* note 2, at 13 (stating that in gender-biased language, "practices and usage express a bias against women in favor of men"); BOBBY D. SORRELS, *THE NONSEXIST COMMUNICATOR* 1 (1983) ("Broadly defined, sexist communication precasts either females or males into roles on the basis of sex alone.").

12. See MILLER & SWIFT, *supra* note 7, at 51 (arguing against "suffix words used to introduce an irrelevant sexual distinction" (emphasis added)); Parks & Robertson, *supra* note 11, at 402 (defining sexist language as "words, phrases, and expressions that unnecessarily differentiate between women and men or exclude, trivialize, or diminish either gender" (internal citation omitted)).

13. See, e.g., William B. Hill, *A Need for the Use of Nonsexist Language in the Courts*, 49 WASH. & LEE L. REV. 275, 276 (1992) ("Nonsexist, genderless, gender free and gender neutral are terms descriptive of language that includes both men and women, rather than excludes women.").

14. See Cheryl B. Preston, *This Old House: A Blueprint for Constructive Feminism*, 83 GEO. L.J. 2271, 2296–97 (1995) (using the term "gender-inclusive language").

males, it is most often directed against women, and its negative effects are typically experienced by women.<sup>15</sup>

### A. Gender as an Attribute of Language

Many of the world's languages employ grammatical gender systems.<sup>16</sup> The term *gender* has its roots in the Old French word *gendre*, which simply meant *kind*.<sup>17</sup> For linguists, "[g]enders are classes of nouns reflected in the behavior of associated words."<sup>18</sup> While grammatical gender may have some connection to sex, the two categories are not coextensive,<sup>19</sup> and in some languages gender labels have little connection to sex.<sup>20</sup> In other languages, called "semantic" or "natural gender systems," grammatical gender is determined by the sex of the word's referent.<sup>21</sup> These differences mean that eliminating gender bias is fraught with its own special problems in each language.<sup>22</sup> Because this Article covers American judges, it focuses on the English language, which is a natural gender system.<sup>23</sup>

### B. Gender Bias in the English Language

Gender-biased language manifests itself in three ways in English. The first is through male-linked words that are used in a pseudo-ge-

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15. Janet B. Parks & Mary Ann Robertson, *Attitudes Toward Women Mediate the Gender Effect on Attitudes Toward Sexist Language*, 28 PSYCHOL. WOMEN Q. 233, 233 (2004) ("Although sexist language can be directed toward men, studies in English-speaking cultures have established that its deleterious and disempowering effects typically accrue to women." (internal citation omitted)).

16. GREVILLE G. CORBETT, GENDER 1-2 (1991).

17. *Id.* at 1.

18. *Id.* (internal quotation marks omitted). Unlike English, some other languages require that articles and adjectives agree in gender with the nouns they modify. Pauwels, *Linguistic Sexism*, *supra* note 9, at 556-59.

19. CORBETT, *supra* note 16, at 1 (calling gender "the most puzzling of the grammatical categories").

20. PAUWELS, CHANGING LANGUAGE, *supra* note 2, at 37-38.

21. *Id.*

22. See DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 6 (2d ed. 1992) ("[T]he challenge to sexist language could and can be found among speakers of many languages, including French, German, Dutch, Italian and Japanese."); ANN WEATHERALL, GENDER, LANGUAGE AND DISCOURSE 11 (2002) (stating that sexist language has been an issue for speakers of many languages); Graham Martin, *When Is a 'Manageress' a 'Manager'? Approaches to Gender-Neutral Language Use in Five West European Languages*, 40 LINGUIST 80, 80-83 (2001) (discussing efforts at gender-neutral language in English, French, Spanish, Italian, and German); Pauwels, *Linguistic Sexism*, *supra* note 9, at 556-59 (discussing specific difficulties in the use of gender-neutral terms in Dutch, German, French, and Spanish).

23. PAUWELS, CHANGING LANGUAGE, *supra* note 2, at 37.

neric sense.<sup>24</sup> This includes using nouns like *man* and *mankind* to refer to both females and males, as in the following sentence: “[M]an needs food.”<sup>25</sup>

The pseudo-generic masculine also occurs in the gendered third-person-singular pronouns *he*, *him*, and *his*,<sup>26</sup> which cause what has been termed “the pronoun problem.”<sup>27</sup> When these pronouns refer to identified persons, they do not meet this Article’s definition of gender bias because they do not present the masculine as the norm. A problem arises, however, when a writer needs a pronoun to refer to a person of unspecified sex, as in this example: “An attorney should present his argument in plain English.” This use of the masculine pronoun is inaccurate for the legal field, which is now composed of about one-third women,<sup>28</sup> and it illustrates how pseudo-generic terms treat the masculine as the norm by omitting express reference to the feminine. Women are thus “eliminated from language, and consequently from thought and reality.”<sup>29</sup>

Many English speakers are not aware that the pseudo-generic masculine is of rather late invention: male grammarians promulgated it in the eighteenth century.<sup>30</sup> Concerned about the growing acceptance of *they* as a singular pronoun, grammarians proposed to solve that problem through a generic masculine that would include both the male and the female.<sup>31</sup> Significantly, in trying to fix the lack of

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24. See Frank, *supra* note 8, at 119 (using the term “pseudogenerics” to refer to male-linked terms that purportedly include persons of both sexes).

25. SPENDER, *supra* note 10, at 152.

26. DENNIS BARON, GRAMMAR AND GENDER 98 (1986) (“[G]ender agreement in English occurs not between adjective and noun but in the pronoun system, specifically the third person pronoun.”); Martin, *supra* note 22, at 80 (explaining that in English, a major focus of the language revolution has been on personal pronouns).

27. See Beverly Ray Burlingame, Comment, *Reaction and Distraction: The Pronoun Problem in Legal Persuasion*, 1 SCRIBES J. LEG. WRITING 87, 87 (1990).

28. ABA COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN IN THE LEGAL PROFESSION 14 (2001); see also SORRELS, *supra* note 11, at 2 (arguing that sexist language is inappropriate partly because many occupations formerly staffed by men now include women).

29. SPENDER, *supra* note 10, at 157.

30. MILLER & SWIFT, *supra* note 9, at 36 (“Not until the eighteenth century did a ‘rule’ mandating . . . usage [of the generic *he*] appear in an English grammar book, and not until the nineteenth century was it widely taught.”); SPENDER, *supra* note 10, at 148 (stating that in 1746, grammarian John Kirby formulated a rule that “the male gender was *more comprehensive* than the female”); Ann Bodine, *Androcentrism in Prescriptive Grammar: Singular “They,” Sex-Indefinite “He,” and “He or She,” in The Feminist Critique of Language* 166, 172 (Deborah Cameron ed., 1990) (explaining that prescriptive grammarians established the “sex-indefinite ‘he’” only two and a half centuries ago).

31. MILLER & SWIFT, *supra* note 9, at 36.

number agreement in the singular use of *they*, these grammarians created another problem of agreement—this time in gender.<sup>32</sup> They justified this on the premise that the masculine comprehends, or includes, the feminine,<sup>33</sup> dismissing the omission of the feminine as unimportant.<sup>34</sup> Anthropologist Ann Bodine contends that this reflects the grammarians' "androcentric worldview."<sup>35</sup> Bodine showed that the generic masculine took firm hold in the teaching of English grammar. In 1975, she surveyed American junior and senior high school grammar books and found that nearly all of them mandated the generic masculine.<sup>36</sup>

A second type of gendered language in English is gender-marked terminology. Gendered kinship terms like *mother* and *father* legitimately describe roles based on sex.<sup>37</sup> However, other words like *waitress*, *chairman*, and *chairwoman* are unnecessarily gender-marked.<sup>38</sup> When persons of both sexes perform the same functions, calling attention to their sex in this way is gratuitous.<sup>39</sup> Such gendered terms "often make women invisible, treat them as secondary or have a trivialising effect on the linguistic portrayal of women."<sup>40</sup> These terms can be replaced with more neutral words,<sup>41</sup> like *server* and *chair*.<sup>42</sup>

The titles *Miss* and *Mrs.* create a unique problem because they identify a woman's marital status. These terms have no counterparts for men, for whom *Mr.* applies to both the married and the unmar-

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32. Bodine, *supra* note 30, at 170.

33. *Id.* at 172 (internal quotation marks omitted).

34. MILLER & SWIFT, *supra* note 9, at 36.

35. Bodine, *supra* note 30, at 171; see also Julia P. Stanley, *Sexist Grammar*, 39 C. ENG. 800, 800 (1978) (observing that English grammar rules "were [historically] written by men for the edification of other men, and, as such, they deal with male concerns from a male point of view").

36. Bodine, *supra* note 30, at 177 (reporting that the textbooks recommended the generic masculine instead of pronoun pairs like *he or she*).

37. See MILLER & SWIFT, *supra* note 7, at 51.

38. See *id.* (noting that many gendered terms "introduce an irrelevant sexual distinction").

39. See Parks & Robertson, *supra* note 11, at 401 (noting that terms like "drum major" and "majorette" are "hierarchic and separatist").

40. PAUWELS, CHANGING LANGUAGE, *supra* note 2, at 43; see also Ann Weatherall, *Women and Men in Language*, 25 HUM. COMM. RES. 275, 277 (1998) (stating that biased language "conceal[s] the existence and importance of women as a social group" (internal citation omitted)).

41. For further resources and suggestions on changing gender-marked language, see discussion *infra* Part III.

42. But see Michael Levin, *Vs. Ms.*, in SEXIST LANGUAGE 217, 217-22 (Mary Vetterling-Braggin ed., 1981) (objecting to calling persons "chairs"); William Safire, *On Language*; *Genderese*, N.Y. TIMES, May 16, 1999, § 6 (Magazine), at 30 (objecting to replacing "chairman" with "chair" because it "sound[s] four-legged").

ried. The implicit suggestion is that a woman's marital status is everyone's business, while a man's is not.<sup>43</sup> To move beyond that biased assumption, feminists promoted the use of *Ms.*, which, like *Mr.*, does not identify marital status.<sup>44</sup> Its wide acceptance has been one of the most successful aspects of the effort to promote nonsexist language. Although *Ms.* has not universally replaced the older terms, it is now commonly used.<sup>45</sup>

A third type of gender-biased language arises from the user's own choice and sometimes consists of repeating old, formulaic phrasing. This includes references to men and women in nonparallel terms, like *man and wife*.<sup>46</sup> It may also involve referring to women in terms that demean or trivialize them, such as calling an adult woman a "girl" or "honey." As linguist Deborah Cameron has explained, when used by non-intimates, such terms "are inherently disrespectful. They are a unilateral declaration by the man that he need not trouble about the formalities expected between non-intimates."<sup>47</sup>

Within recent memory, judges have addressed women in the courtroom with such terms, including "little girl" and "honey."<sup>48</sup> Simi-

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43. See PAUWELS, *CHANGING LANGUAGE*, *supra* note 2, at 59 ("This discriminatory practice is said to mark the availability of women in terms of marriage (sex) and reinforces the view that a woman is the property of a man (either her father or her husband).").

44. See L.M. Purdy, *Against "Vs. Ms.," in SEXIST LANGUAGE*, *supra* note 42, at 227 (Mary Vetterling-Braggin ed., 1981) (discussing "Miss" and "Mrs.," and advocating the use of "Ms."). *But see* Levin, *supra* note 42, at 222 ("In the human species Man is the aggressor and Woman the acceptor. Hence a man has to know, when encountering a new female, if she is eligible for his overtures. A woman need know nothing similar of a new man, since she is not the one responsible for the initiation.").

45. See BARON, *supra* note 26, at 167-72; *see also id.* at 172 (observing in 1986 that "[m]any women have adopted [*Ms.*] as the title of choice").

46. See MILLER & SWIFT, *supra* note 9, at 85-87 (noting that gendered nonparallel pairs "always seem[ ] to work one way: at women's expense").

47. CAMERON, *supra* note 22, at 106; *see also* ROBIN LAKOFF, *LANGUAGE AND WOMAN'S PLACE* 25 (1975) [hereinafter LAKOFF, *WOMAN'S PLACE*] (noting that calling an adult woman a "girl" suggests that she is immature and irresponsible); *see also* Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221, 259 (2005) (observing that calling an adult woman "the girl" or "my girl" indicates that she is subordinate).

48. *See, e.g.*, ADVISORY COMM. ON GENDER BIAS IN THE COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS: FINAL REPORT* 61 (Gay Danforth & Bobbie L. Welling eds., 1996), available at <http://www.courtinfo.ca.gov/programs/access/documents/freport.pdf> (reporting that "[w]itnesses too numerous to mention cited instances of . . . [judges calling them] 'honey' or some other familiar term usually reserved for members of one's family . . ."); *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 738 (2001) [hereinafter *Gender Bias Final Report*] (reporting that one judge addressed woman lawyers as "missy-miss"); John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 812 (1994) (reporting that some attorney respondents in

larly trivializing references appeared in past judicial opinions; two nineteenth-century judges used patronizing terminology in holding that women should not be admitted to the practice of law. Justice Bradley wrote in a concurrence to a United States Supreme Court opinion of the "natural and proper timidity and delicacy" of women,<sup>49</sup> and a Wisconsin judge opined that "[w]omanhood is moulded for gentler and better things" than the legal profession.<sup>50</sup> Law professor Deborah Rhode recently observed that due to increased consciousness about demeaning language, the use of such trivializing terms is no longer common.<sup>51</sup>

### C. The Movement for Gender-Neutral Language

The gender bias in the English language was confronted sporadically before the twentieth century. For example, in the late nineteenth century both Julia Smith<sup>52</sup> and Elizabeth Cady Stanton<sup>53</sup> rewrote the Bible in gender-neutral language. But a concerted movement for widespread change arose only in the late 1960s, as the second wave of the women's movement gathered momentum.<sup>54</sup> Feminists in the United States began to promote gender-neutral language as "trailblazers in both exposing sexist bias and proposing changes."<sup>55</sup>

The latter part of the twentieth century saw an increase in the trend toward gender-neutral language in English.<sup>56</sup> As professionals in various fields began to adopt it, gender-neutral language appeared in employment advertising, textbooks, popular media, dictionaries,<sup>57</sup>

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a Ninth Circuit survey said federal judges had addressed them as "young lady" or "little girl"); Nancy Blodgett, *"I Don't Think that Ladies Should Be Lawyers,"* 72 A.B.A. J. 48, 51 (1986) (reporting that a New York judge called a courtroom lawyer "little girl").

49. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

50. *In re Goodell*, 39 Wis. 232, 245 (1875).

51. DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 20 (2001).

52. See Frank, *supra* note 8, at 128 (referring to Julia Smith's 1876 feminist Bible).

53. See Tracy A. Thomas, *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 22 CONST. COMMENT. 137, 153-54 (2005) (citing ELIZABETH CADY STANTON, THE WOMAN'S BIBLE (1896), and recounting how Stanton rewrote the Bible "using a feminist lens").

54. CAMERON, *supra* note 22, at 9 (stating that feminists began examining sexism in language "during the late 1960s and 1970s"); Frank, *supra* note 8, at 118 ("The reawakening and growth of the feminist movement in the late 1960s and 1970s rekindled interest in the question of language and gender.").

55. Pauwels, *Linguistic Sexism*, *supra* note 9, at 552.

56. *Id.* at 563-65.

57. PAUWELS, CHANGING LANGUAGE, *supra* note 2, at 203-09 (documenting changes in these areas).



and religious publications.<sup>58</sup> Studies reported a decline in the use of masculine nouns and pronouns as generics,<sup>59</sup> with one study finding a notable decline in their use in American newspapers and magazines between 1971 and 1979.<sup>60</sup> A 1993 news article reported anecdotal evidence that New York judges' choices of language were "a sign of how mainstream the cause of 'inclusive language' has become 30 years after the feminist movement of the 1960s."<sup>61</sup> As one scholar observed, "We are becoming less and less able to envision females when male terminology is used."<sup>62</sup>

Some commentators object to the movement for gender-neutral language.<sup>63</sup> One of their objections is based on tradition: they argue that entrenched language patterns should not be changed.<sup>64</sup> Student subjects in a 1998 study who were largely supportive of gender-neutral language cited tradition as the major reason for any remaining resistance, mentioning both "the difficulty of change for the individual and the pervasive influence of perceived tradition in [our] society."<sup>65</sup> A second objection to gender-neutral language is that "the sexist language problem is trivial."<sup>66</sup> A third is based on aesthetics, with an underlying assumption that gender-neutral language must necessarily be awkward.<sup>67</sup> A fourth objection is that gender-neutral language may an-

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58. *Id.* at 31 (noting that feminist theologian Mary Daly has had a significant impact on changing gender-biased language in religious expression).

59. Pauwels, *Linguistic Sexism*, *supra* note 9, at 563.

60. Robert L. Cooper, *The Avoidance of Androcentric Generics*, 50 INT'L J. SOC. LANGUAGE 5, 11 (1984). Cooper found the greatest decline in androcentric generics in publications "addressed to women and the well-educated." *Id.* at 19.

61. Deborah Pines, *When 'She' Replaces 'He' at Foley Square*, N.Y. L.J., Nov. 1, 1993, at 1.

62. Preston, *supra* note 14, 2295-96.

63. See Maija S. Blaubergs, *An Analysis of Classic Arguments Against Changing Sexist Language*, 3 WOMEN'S STUD. INT'L Q. 135, 136 (1980) (listing arguments advanced against changing masculine generics); Frank, *supra* note 8, at 124 (stating that some negative reactions have "taken the form of ridicule and satire"); Levin, *supra* note 42, at 222 (asserting that nonsexist language reforms are "encroachments to resist"); Parks & Robertson, *supra* note 11, at 401-02 (citing participants on both sides of the debate about gender-neutral language).

64. See Frank, *supra* note 8, at 124-25 (citing appeals to tradition by opponents of language reform); Janet B. Parks & Mary Ann Robertson, *Contemporary Arguments Against Nonsexist Language: Blaubergs (1980) Revisited*, 39 SEX ROLES 445, 453 (1998) (citing appeals to tradition by opponents of language reform).

65. Parks & Robertson, *supra* note 64, at 459.

66. Paula A. Treichler & Francine Wattman Frank, *Preface to Guidelines for Nonsexist Usage*, in LANGUAGE, GENDER, AND PROFESSIONAL WRITING: THEORETICAL APPROACHES AND GUIDELINES FOR NONSEXIST USAGE 137, 137 (Francine Wattman Frank & Paula A. Treichler eds., 1989).

67. Justice Antonin Scalia recently opined that gender-neutral language can create awkward phrasing. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF

noy readers who do not support it.<sup>68</sup> The first two objections are countered in Part II, which explains why gender-neutral language is important. Part III counters the third and fourth objections and presents a variety of suggestions for writing graceful and unobtrusive gender-neutral language.

## II. Why Gender-Neutral Language Is Important

Scholars and commentators in several fields have shown that concerns about biased language are far from trivial. Language scholars, psychologists, and framing theorists have demonstrated that biased language affects individuals' perceptions of themselves and the world. Meanwhile, legal professionals have articulated the importance of nonsexist language to fairness in the law and the clarity of legal documents.

### A. Language Scholars' Views

Casey Miller and Kate Swift, influential proponents of gender-neutral language, alluded to a perhaps apocryphal research report entitled "Development of the Uterus in Rats, Guinea Pigs, and Men."<sup>69</sup> By implying that male humans have uteruses, this title dramatizes what language scholars' research has now solidly shown: that supposedly generic male-linked words are often perceived as referring only to males.<sup>70</sup> For example, when students were asked to submit pictures of subjects related to a sociology course, those given male-linked generic titles like "urban man" thought more often of males than females and

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PERSUADING JUDGES 119 (2008); see also Safire, *supra* note 42, at 30 (stating that gender-neutral language "can pull the punch out of a good sentence," but acknowledging that proponents of gender-neutral language sometimes "have indisputable logic on their side"). But see Treichler & Frank, *supra* note 66, at 141 (stating "convoluted alternatives almost always signal a deeper problem and the need for further analysis in the writing or editing process").

68. See Parks & Robertson, *supra* note 64, at 453 (noting some study subjects' object to the use of gender-neutral language).

69. MILLER & SWIFT, *supra* note 9, at 9.

70. See William R. Todd-Mancillas, *Masculine Generics=Sexist Language: A Review of the Literature and Implications for Speech Communication Professionals*, 29 COMM. Q. 107, 115 (1981) (summarizing fourteen studies showing that subjects "perceive 'man'-linked words and third-person-singular masculine generics as referencing men more frequently than women"); PAUWELS, *CHANGING LANGUAGE*, *supra* note 2, at 71-73 (citing studies); Janet Bing, *Penguins Can't Fly and Women Don't Count: Language and Thought*, 15 WOMEN & LANGUAGE 11 (1992) (same); John Gastil, *Generic Pronouns and Sexist Language: The Oxymoronic Character of Masculine Generics*, 23 SEX ROLES 629, 630 (1990) (same); see also Parks & Robertson, *supra* note 11, at 402 (discussing the impact of masculine-based language).

were more likely to submit photographs of males only.<sup>71</sup> In another study, subjects were asked to describe the gender of persons referred to by male-linked generic phrases like "[t]he potentialities of man."<sup>72</sup> In response to open-ended questions, 66% described males, 29% described neither sex exclusively, and only 5% described females.<sup>73</sup> Similarly, John Gastil found that generic masculine pronouns evoked a disproportionate number of male images.<sup>74</sup>

These studies document the impact of gender-biased language on perceptions about women. It subtly creeps into the consciousness of both women and men, burdening them with stereotypes about the meaning of being female or male.<sup>75</sup> Gender-biased language "reinforce[s] sexist attitudes and behaviors,"<sup>76</sup> assigning "secondary status" to females.<sup>77</sup> Thus, linguist Anne Pauwels concluded that gender-biased language "not only reflects but also helps to construct and perpetuate a sexist reality."<sup>78</sup>

## B. Psychologists' and Social Scientists' Views

Scholars from the fields of psychology and social science have corroborated language scholars' conclusions. Psychology professor Laura Madson and Jennifer Shoda found that student subjects perceived pseudo-generic masculine words as gender-biased,<sup>79</sup> and Mykol Hamilton found that subjects hearing a story that used male-linked generics saw male images more than female ones.<sup>80</sup> Allen McConnell and Russell Fazio's study of gender-marked language showed that

71. Todd-Mancillas, *supra* note 70, at 109 (citing Joseph W. Schneider & Sally Hacker, *Sex Role Imagery and the Use of the Generic 'Man' in Introductory Texts: A Case in the Sociology of Sociology*, 8 AM. SOCIOLOGIST 12-18 (1973)).

72. *Id.* (citing Virginia Kidd, *A Study of the Images Produced Through the Use of the Male Pronoun as the Generic*, 1 MOMENTS CONTEMP. RHETORIC & COMM. 25 (1971)). Linguist Grenville Corbett theorized that this occurs partly because in English, *he* appears three times more often than *she*. CORBETT, *supra* note 16, at 221.

73. See sources cited *supra* note 72.

74. Gastil, *supra* note 70, at 638-39.

75. MILLER & SWIFT, *supra* note 7, at x; Parks & Robertson, *supra* note 11, at 402 (citing studies).

76. Gastil, *supra* note 70, at 630.

77. MILLER & SWIFT, *supra* note 7, at x.

78. PAUWELS, CHANGING LANGUAGE, *supra* note 2, at 92; see also Bing, *supra* note 70, at 11 (arguing that language affects thought).

79. Laura Madson & Jennifer Shoda, *Alternating Between Masculine and Feminine Pronouns: Does Essay Topic Affect Readers' Perceptions?*, 54 SEX ROLES 275, 284 (2006).

80. Mykol C. Hamilton, *Masculine Bias in the Attribution of Personhood*, 15 PSYCHOL. WOMEN Q. 393, 396-97 (1991).

male-linked generic words were associated with masculine traits.<sup>81</sup> They concluded that concerns about biased language are “grounded in more than either esthetic or philosophical considerations but reflect[ ] psychological impact as well.”<sup>82</sup> Other studies from the social sciences have reached similar conclusions.<sup>83</sup> Gender-biased language has even been shown to limit girls’ views of their vocational options.<sup>84</sup> As feminist Dale Spender stated, language “determines the limits of our world, which constructs our reality.”<sup>85</sup> Gender-neutral language more accurately reflects that reality.<sup>86</sup>

### C. Framing Theorists’ Views

While linguists and psychologists have documented the negative effects of biased language, framing theory offers an explanation for those effects. In the past few decades, framing theory has gained considerable currency in several fields, including linguistics, sociology, communication, and political science.<sup>87</sup> In his seminal book on frame analysis, sociologist Erving Goffman defined frames as “schemata of interpretation” through which users “locate, perceive, identify, and label” experience.<sup>88</sup> Frames, then, are mental structures, similar to picture frames, which define the perimeters of each individual’s unique focus. Political scientist James N. Druckman explained that a framing effect occurs when, in describing an occurrence, a person’s emphasis on certain considerations causes others “to focus on these considera-

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81. Allen R. McConnell & Russell H. Fazio, *Women as Men and People: Effects of Gender-Marked Language*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1004, 1011 (1996) (reporting data showing that “gender-marked language can influence perceivers’ judgments about a target’s personality characteristics”).

82. *Id.*

83. See Madson & Shoda, *supra* note 79, at 275 (citing studies).

84. Parks & Robertson, *supra* note 11, at 402.

85. SPENDER, *supra* note 10, at 139.

86. See CAMERON, *supra* note 22, at 103 (stating that gender-neutral language is more “into line with the way things really are”).

87. See Barbara Gray, *Framing of Environmental Disputes*, in MAKING SENSE OF ENVIRONMENTAL CONFLICTS: FRAMES AND CASES 11, 13 (Roy J. Lewicki, Barbara Gray & Michael Elliott eds., 2003) (“Numerous definitions of frames have been provided by researchers in cognitive psychology, microsociology, and sociolinguistics.”); Robert D. Benford & David Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 611 (2000) (citing scholars who have applied framing theory in the fields of cognitive psychology, linguistics, communication, political science, and sociology); Deborah Tannen, *What’s in a Frame? Surface Evidence for Underlying Expectations*, in FRAMING IN DISCOURSE 14, 15 (Deborah Tannen ed., 1993) (noting that framing theory has been applied in various fields, including social psychology and linguistics).

88. ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON ORGANIZATION OF EXPERIENCE* 21 (1974).

tions when constructing their opinions.”<sup>89</sup> Mental frames are not always conscious, but they affect how we see our world, and they are expressed through language.<sup>90</sup> According to sociolinguist Robin Lakoff, “[W]e say things without knowing their significance, but the fact that we have said them shows that there is more going on in our minds than we consciously take credit for.”<sup>91</sup> This suggests that the language in judges’ opinions tells something about how they see the world.

In addition to reflecting their own views, judges’ language can also influence their readers’ cognitive schema. Prototype theory in cognitive linguistics concerns how people categorize items. It holds that “[c]ategorization is not a matter to be taken lightly,” because it influences people’s thoughts.<sup>92</sup> Indeed, words can influence persons “in a subliminal, subconscious way, doing their damage over a period of time by reinforcing negative self-image.”<sup>93</sup> This ability of language to alter thinking is the basis of a branch of framing theory that both examines and develops political strategies.<sup>94</sup> Even grammatical gender has been shown to affect perceptions by prompting people to make comparisons they would not otherwise have made.<sup>95</sup> Framing theory shows that if judges use gender-biased language, they construct a frame through which both women and men see men as the dominant norm.<sup>96</sup>

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89. James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. POL. 1041, 1042 (2001).

90. GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT, at xv (2004) [hereinafter LAKOFF, ELEPHANT] (“We . . . know frames through language.”).

91. LAKOFF, WOMAN’S PLACE, *supra* note 47, at 1.

92. GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 5–6 (1987).

93. VAL DUMOND, THE ELEMENTS OF NONSEXIST USAGE: A GUIDE TO INCLUSIVE SPOKEN AND WRITTEN ENGLISH 6 (1990).

94. See, e.g., LAKOFF, ELEPHANT, *supra* note 90, at 4 (providing examples of language that has affected public opinion, and noting that “[f]raming is about getting language that fits your world view”); Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221, 224 (1997) (“Frames can be meaningful and important determinants of public opinion.”).

95. LERA BORODITSKY, LAUREN A. SCHMIDT & WEBB PHILLIPS, *Sex, Syntax, and Semantics*, in LANGUAGE IN THE MIND 61, 74, 77 (Dedre Gentner & Susan Goldwin-Meadow eds., 2003); see also Nayda Terkildsen & Frauke Schnell, *How Media Frames Move Public Opinion: An Analysis of the Women’s Movement*, 50 POL. RES. Q. 879, 893–94 (1997) (concluding that framing feminist issues affects citizens’ opinions).

96. See Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 397–98 (2006) (“How people respond to an issue depends on how it is presented or ‘framed’ to them.”).

## D. Legal Professionals' Views

The movement for gender-neutral language has had notable effects in the legal profession. Beginning in the 1980s, a wave of gender task-force studies appeared in various American jurisdictions, both state and federal.<sup>97</sup> These studies examined various aspects of women and the law, including whether women were treated fairly in law schools and the legal system. Some of the published reports proposed the use of gender-neutral language in statutes, judicial opinions, and other legal writing.<sup>98</sup> Some states adopted gender-neutral language in their constitutions,<sup>99</sup> statutes, or other legal discourse,<sup>100</sup> and sections on gender-neutral language began to appear in legal writing textbooks.<sup>101</sup>

These changes were based first of all on principles of fairness. As Judge William Hill stated, the legal profession "demands of its practitioners a reverence and respect for the power of the written and spoken word."<sup>102</sup> When lawyers' language excludes "more than one-half

97. See Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 320 n.39 (2001) (citing studies); Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN'S L.J. 93, 93 n.1 (2004) (same).

98. See, e.g., OHIO JOINT TASK FORCE ON GENDER FAIRNESS, FINAL REPORT 6 (1995) (proposing that gender-neutral language be used in "all rules, canons, jury instructions and other materials prepared by all participants in the justice system"); *Gender Bias Final Report*, *supra* note 48, at 786 (noting that "most language in court publications [in Virginia] is gender-neutral," and recommending that "[a]ll court documents be reviewed periodically for gender-neutral language"); *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 658 (1993) (recommending that gender-neutral language be used in numerous specified publications and that judges and clerks be encouraged to use it); *Final Report: Gender Bias Task Force Report Summary*, 6 WIS. WOMEN'S L.J. 173, 174 (1991) (recommending that jury instructions be written in gender-neutral language).

A New York committee published a pamphlet recommending the use of gender-neutral language in the courts. See NEW YORK STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, FAIR SPEECH: GENDER NEUTRAL LANGUAGE IN THE COURTS 4 (2d ed. 1997) [hereinafter FAIR SPEECH PAMPHLET].

99. See Darryl McGrath, *Six State Constitutions Use Gender-Neutral Wording*, WOMEN'S ENEWS, Dec. 9, 2001, <http://www.womensenews.org/article.cfm?aid=749> (identifying California, Hawaii, Maine, Rhode Island, Vermont, and Florida as having incorporated gender-neutral language in their constitutions).

100. See, e.g., *Miscellaneous Docket No. 96-9276: In the Supreme Court of Texas*, 60 TEX. B.J. 166, 169 (1997) (recommending that judges, lawyers, and court personnel "[u]se gender-neutral language in all court correspondence and jury instructions").

101. See, e.g., LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 217-21 (4th ed. 2006); RICHARD K. NEUMANN & SHEILA SIMON, *LEGAL WRITING* 157-58 (2008); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* 681-85 (4th ed. 2006) (each recommending gender-neutral language and suggesting techniques for writing it).

102. Hill, *supra* note 13, at 275.

of the population," Judge Hill argued, "then surely something is awry."<sup>103</sup> He concluded that avoiding gender bias in legal discourse "is the right thing to do."<sup>104</sup> Numerous legal commentators have urged lawyers to use gender-neutral language,<sup>105</sup> often stressing that the law conveys a society's norms, which should be fair to all its members.<sup>106</sup> Few have opposed these views.<sup>107</sup> As Judge Judith Kaye stated, "[W]hy shouldn't lawyers lead others in promoting equality in every way possible?"<sup>108</sup>

Beyond merely reflecting social changes, legal writers can help construct norms of fairness that readers internalize cognitively and perhaps also emotionally and morally. Gender-neutral language can thus help construct a frame of the legal system that includes and empowers both genders.<sup>109</sup>

A second reason for gender-neutral language in the law is that it is more exact. A New York judicial committee observed that gender-biased language often sacrifices clarity.<sup>110</sup> When certain words sometimes mean males, sometimes mean females, and sometimes include both sexes, confusion may result.<sup>111</sup>

103. *Id.* at 276.

104. *Id.* at 275.

105. See, e.g., TERRI LECLERCQ, EXPERT LEGAL WRITING 127–33 (1995) (suggesting ways to incorporate gender-neutral language); Burlingame, *supra* note 27, at 87 (noting that generic masculine language is "now widely considered inherently sexist"); Richard Bales, *Gender-Neutral Language*, 66 BENCH & B. KY. 40, 40–41 (2002) ("Gender-neutral language has become both accepted and expected."); Gerald Lebovits, *He Said–She Said: Gender-Neutral Writing*, 74 N.Y. ST. B.J. 64, 64 (2002) (stating that those who view the movement for gender-neutral language as a phase "are wrong").

106. See, e.g., Lebovits, *supra* note 105, at 64 (arguing that "discriminatory writing perpetuates discrimination"); see also LECLERCQ, *supra* note 105, at 127, 129 (arguing that lawyers should be concerned about gender-biased language partly because it "excludes much of its audience").

107. One of the few unequivocal opponents of gender-neutral language in the law offered two main arguments. The first was based on the aesthetic argument that avoidance of the generic masculine can lead to awkward phrasing. The second was based on the libertarian argument that authors should be free to choose their language. See Steven Shavell, Comment, 82 GEO. L.J. 1777, 1777–78 (1994).

Justice Antonin Scalia recently argued that gender-neutral language often requires a sacrifice to the "second-best circumlocution." SCALIA & GARNER, *supra* note 67, at 119. At the insistence of his co-author Garner, however, who favors "invisible gender-neutrality," Scalia agreed that they would write their book in gender-neutral language. *Id.* at 116–17.

108. Kaye, *supra* note 3, at 2; see also Hill, *supra* note 13, at 276 (arguing that courts should use gender-neutral language because of their desire to "include all members of society as equal participants").

109. See SPENDER, *supra* note 10, at 139 (stating that language creates a classification system that shapes individuals' views about reality).

110. FAIR SPEECH PAMPHLET, *supra* note 98, at 4.

111. SORRELS, *supra* note 11, at 2.

Indeed, legal problems can arise from the use of the generic *he*. A statute can be unclear if it uses a feminine pronoun in one part but only masculine pronouns in others.<sup>112</sup> For example, one woman's second-degree murder conviction was reversed because a jury instruction on self-defense used only the pronoun *he*.<sup>113</sup> The defendant was a five-foot-four-inch woman on crutches, while the victim, who had threatened her, was a large, intoxicated man.<sup>114</sup> The court held that use of only the masculine gender in the jury instruction incorrectly suggested that the woman had the same self-defense options a man would have, implying that the jurors should use the same standard they would apply to a fight between men.<sup>115</sup>

Problems with clarity have been exacerbated by courts' inconsistent treatment of male-linked generic pronouns. Courts sometimes hold that the generic *he* refers to only males and sometimes hold that it refers to both sexes.<sup>116</sup> In *State v. James*, the court held that where the statute about qualifications of petit jurors used the masculine pronoun *he*, the reference was to males only, so the sheriff would have exceeded his authority had he summoned women for the jury.<sup>117</sup> But in *Snyder's Estate v. Denit*,<sup>118</sup> the court stated that in statutory construction, the masculine includes the feminine, but the feminine does not include the masculine.<sup>119</sup> The court therefore held that a testator who wrote *she* must have meant to include only female descendants.<sup>120</sup>

A third reason to use gender-neutral language is that it benefits the writer's cause. Whether or not the legal writer personally sees gender-neutral expression as important, "the fact remains that many brief readers—male and female judges and their staffs—do notice and do care."<sup>121</sup> Biased language is like a cinder in the eye to many readers, and "it is decidedly in the brief-writer's self-interest to eliminate the cinders."<sup>122</sup>

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112. Petersson, *supra* note 8, at 109–11.

113. *State v. Wanrow*, 559 P.2d 548, 558–59 (Wash. 1977) (en banc).

114. *Id.* at 551.

115. *Id.* at 558.

116. See Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 WOMEN'S L. REP. 1, 6 (1998).

117. 114 A. 553, 555 (N.J. 1921).

118. 72 A.2d 757 (Md. 1950).

119. *Id.* at 761.

120. *Id.*

121. Kaye, *supra* note 3, at 2.

122. *Id.*



### III. Gender-Neutral Language in English

A preliminary question for the present study concerns how writers can frame gender-neutral language in English. A writer who decides to use gender-neutral language has several ways to achieve that end. They have met with varying degrees of acceptance.

#### A. Pronouns

Some proposed substitutes for generic masculine pronouns involve significant departures from current usage, employing neologisms<sup>123</sup> like *heris* (for *her* or *his*), *herm* (for *him* or *her*),<sup>124</sup> *tey* (for *he* or *she*),<sup>125</sup> and *ter* (for *him* or *her*).<sup>126</sup> Other substitutes would add punctuation to existing words to create forms like *s/he*, *he/she*, and *(s)he*.<sup>127</sup> A major problem with the latter terms, as William Safire has observed, is that they are “unspeakable.”<sup>128</sup> Attempts to introduce such neologisms into wide use have thus far failed.<sup>129</sup>

Reader expectation theory, which Deborah Tannen connects to framing theory,<sup>130</sup> helps explain why these neologisms are less than satisfactory for legal writing. Reader expectation theory holds that writers communicate more effectively if they use linguistic structures that readers expect.<sup>131</sup> Linguistic quirks cause readers to stumble,

123. See RICHARD S. NEAL, *THE DEFINITIVE SOLUTION TO THE PROBLEM OF SEXIST LANGUAGE: HOW AND WHY IT IS SOLVED* (2003). Under his guidelines for creating new words, see *id.* at 17–19, the generic substitute for *him* and *her* would be *hir*. *Id.* at 20–21. The suffix *-man* would become *-wan*. *Id.* at 30–31. The word *human* would thus become *huwan*. *Id.* at 42. Neal believes such changes are unobtrusive and likely to be accepted. *Id.* at 41–43. I disagree. See *infra* text accompanying notes 128–134.

124. Todd-Mancillas, *supra* note 70, at 113.

125. *Id.*; MILLER & SWIFT, *supra* note 7, at 130 (1976). For a chronological list of numerous new words proposed as substitutes for the generic masculine pronouns from the years 1850 to 1985, see BARON, *supra* note 26, at 198–209.

126. Todd-Mancillas, *supra* note 70, at 113.

127. Treichler & Frank, *supra* note 66, at 161 (recommending that writers avoid forms that use slashes or parentheses).

128. WILLIAM SAFIRE, *I STAND CORRECTED* 179 (1984).

129. CORBETT, *supra* note 16, at 223 (stating that because few other languages use such terms, it is not surprising that these neologisms have not been widely accepted in English); BARON, *supra* note 26, at 212 (noting that these contrived epicene pronouns have not been widely adopted); SORRELS, *supra* note 11, at 21 (noting that such forms are not likely to achieve “widespread acceptance” in the near future).

130. See Tannen, *supra* note 87, at 14–15.

131. See GEORGE D. GOPEN, *EXPECTATIONS: TEACHING FROM THE READER'S PERSPECTIVE*, at xv (2004) (stressing the importance of meeting readers' expectations about language choice, and explaining that “[i]f we can take good care of most of our readers most of the time, we are doing a good and great thing”); Tannen, *supra* note 87, at 14 (referring to the “power of expectation” in communication).

breaking their concentration.<sup>132</sup> Because the neologisms mentioned above signal that “a dramatic change” is occurring, some may wish to use them to shock readers.<sup>133</sup> But the legal writer’s purpose is usually not to shock but to explain or persuade. A dramatic departure from expectations may divert legal readers from the writer’s intended message.<sup>134</sup>

A second solution to the pronoun problem is to use the plural forms *their*, *they*, and *them* to refer to singular antecedents. This expedient is now common in informal speech: “If you know anyone who’s going to the meeting, tell them to call me.” Some have promoted this singular *they* as a solution to the pronoun problem.<sup>135</sup> However, the lack of number agreement still causes the reader to stumble and can create confusion about whether the plural pronoun refers to a generic person or a group. Its informality and potential for confusion make it unacceptable in formal writing,<sup>136</sup> including legal writing.<sup>137</sup>

There are less obtrusive ways to avoid biased pronouns.<sup>138</sup> Indeed, “many graceful solutions are available, some of them quite simple.”<sup>139</sup>

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132. GEORGE D. GOPEN, *THE SENSE OF STRUCTURE: WRITING FROM THE READER’S PERSPECTIVE*, at xii (2004) (emphasizing the importance of giving the reader “clear reading instructions”).

133. Todd-Mancillas, *supra* note 70, at 113.

134. See JOSEPH M. WILLIAMS, *STYLE: LESSONS IN CLARITY AND GRACE* 31 (9th ed. 2007) (disapproving of *he/she* and *s/he* as clumsy); Todd-Mancillas, *supra* note 70, at 113 (predicting that “neologisms like ‘heris’ and ‘herm’ are less likely to find acceptance and permanent adoption than the less contrived alternatives such as pluralizing the subject”); Treichler & Frank, *supra* note 66, at 161–62 (stating that forms using brackets or parentheses are “difficult to pronounce and awkward in the possessive”).

135. See Bodine, *supra* note 30, at 177.

136. Treichler & Frank, *supra* note 66, at 155–56 (noting that because the use of “*they* with a singular antecedent is widely condemned within the scholarly community, we do not advocate its use in writing”).

137. ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING* 206 (2d ed. 2005) (calling the singular *they* ungrammatical); Burlingame, *supra* note 27, at 103–04 (stating that the use of the singular *they* “in formal legal writing risks a significant loss of persuasiveness,” and may lead some to “stigmatize the lawyer as illiterate”).

138. For lists of suggestions on how to avoid generic masculine pronouns, see DUMOND, *supra* note 93, at 25; BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 800–01 (2d ed. 2001); MILLER & SWIFT, *supra* note 7, at 158–64; ENQUIST & OATES, *supra* note 137, at 148–50; Treichler & Frank, *supra* note 66, at 153–80; Burlingame, *supra* note 27, at 99–108; Richard B. Klein, *Make It A “Brief,”* 8 VERDICTS, SETTLEMENTS & TACTICS 363, 366 (1990); and Bales, *supra* note 105, at 40–41.

139. Treichler & Frank, *supra* note 66, at 141; see also DUMOND, *supra* note 93, at 1 (“Writing so that you won’t exclude or provoke half your readers need not be difficult.”); SORRELS, *supra* note 11, at 3 (“Natural, graceful, and grammatically correct nonsexist patterns come relatively easily to one who has a commitment to seek them.”).

1. The writer can change an antecedent noun to the plural so that a plural pronoun is appropriate. Thus "A lawyer should file his briefs on time" can become the gender-neutral "Lawyers should file their briefs on time."

2. The writer can recast the sentence to avoid the pronoun altogether: "It is important to file briefs on time." Sometimes the articles *a* or *the* or the word *who*<sup>140</sup> will help: "A lawyer should file a brief on time," or "A lawyer who files a brief late may be sanctioned."

3. The passive voice may eliminate the need for a pronoun: "Briefs should be filed on time." Using the passive voice, of course, can create new difficulties, because passive constructions are often wordy, and the lack of an identified actor tends to make a sentence vague. Therefore, commentators suggest using this alternative sparingly.<sup>141</sup>

4. Alternating pronouns is another way to avoid the generic masculine: "If a lawyer does not file his brief on time, a judge may lose her temper." However, this can distract and confuse a reader trying to follow a discussion by tracing the participants' gender. Respondents in a study by psychologists Madson and Shoda found this option cumbersome,<sup>142</sup> but Treicher and Frank recommend it "if done carefully."<sup>143</sup> A careful approach would avoid the hazard of unintentionally engaging gender stereotypes, which occurred when one speaker used *he* for good students and *she* for a student who was hesitant to ask questions.<sup>144</sup>

5. Paired pronouns can also avoid the generic masculine: "A lawyer should file his or her brief on time." Paired pronouns have the advantage of reflecting reality, and Madson and Shoda found that readers preferred this form over alternating pronouns.<sup>145</sup> Some find this construction clumsy,<sup>146</sup> but it is worth noting that even the term *clumsy* may have some frame-based normative content in this context,

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140. See Treichler & Frank, *supra* note 66, at 166 (suggesting the use of relative pronouns, which have no grammatical gender).

141. See, e.g., *id.* at 172–73 (stating that the passive voice "can produce less than felicitous results," and recommending that writers use it to avoid the generic masculine only when there is not a "more concise and graceful solution").

142. Madson & Shoda, *supra* note 79, at 284.

143. Treichler & Frank, *supra* note 66, at 160.

144. *Id.* at 161.

145. Madson & Shoda, *supra* note 79, at 284 (reporting data showing that readers preferred paired pronouns over alternating pronouns).

146. See Burlingame, *supra* note 27, at 99 (offering a phonological explanation for why the pairs seem clumsy); SORRELS, *supra* note 11, at 20 (advising that, to avoid "distractions and inefficiency," writers should avoid using repeated paired pronouns).

because people's frames have incorporated biased male-linked pronouns.

6. Repeating the noun can avoid the need for a pronoun altogether: "If a lawyer does not file a brief on time, the lawyer may be sanctioned."<sup>147</sup> A disadvantage of this option is that it may be both repetitive and wordy.

7. Similarly, using a synonym can avoid the need for a pronoun: "The clerk keeps the court calendar. That is the person who can schedule your hearing."<sup>148</sup> This option can also result in wordiness. Moreover, it must be undertaken carefully, because it risks confusing readers. Referring to the same person or concept with different terminology can undermine clarity, which is especially important in legal writing.<sup>149</sup>

Because the last five methods can be cumbersome, especially on repeated use, commentators advise using them with care.<sup>150</sup> But taken together, the above suggestions provide writers with many possible unobtrusive solutions.<sup>151</sup> Where a sentence is deftly constructed, the reader may never know that the writer consciously avoided using gender-biased pronouns.

## B. Nouns

Writers can also find graceful ways to change gender-biased nouns and noun phrases. For example, for the pseudo-generic masculine noun *man*, the writer can use *humans* or *persons*: "Humans breastfeed their young." Where words gratuitously identify the sex of a referent, a writer can choose neutral alternatives, for example, by replacing *waitress* with *server* and *policeman* with *police officer*. One scholar noted that compounds including the word *man* are especially resistant to change, perhaps because not all of them can be changed according

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147. See, e.g., MILLER & SWIFT, *supra* note 9, at 43.

148. See FAIR SPEECH PAMPHLET, *supra* note 98, at 8 (suggesting the replacement of a pronoun with a synonym).

149. See BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES 319 (2d ed. 1992) ("[C]onstant variation, sometimes derogatorily called 'elegant variation,' can be irritating and distracting in any context. In legal drafting, it is totally unacceptable because the shifts make a reader wonder whether there is some hidden difference in meaning or reference."); SCALIA & GARNER, *supra* note 67, at 107 (stating that in brief writing, "the same word should be used to refer to a particular key concept").

150. See, e.g., Treichler & Frank, *supra* note 66, at 159 (recommending sparing use of *he* or *she*); *id.* at 160–61 (urging care in alternating pronouns); Burlingame, *supra* note 27, at 105 (recommending sparing use of the passive voice).

151. Bryan Garner, for example, contends that gender-neutrality can be invisible. See SCALIA & GARNER, *supra* note 67, at 116.

to the same formula.<sup>152</sup> For example, *weatherman* can become *weather forecaster*, but *fireman* becomes *firefighter*.<sup>153</sup> Still, the motivated writer can find suitable phrasing, perhaps by consulting one of the many lists of substitutes for gender-biased nouns.<sup>154</sup>

Where the gender-biased language arises from the writer's own choice, a writer can cultivate sensitivity to the problem. Avoiding non-parallel phrasing like *man and wife* and patronizing wording like *the gentle sex* requires that the writer recognize the bias in such terms and seek gender-neutral alternatives. *Husband and wife* is an appropriate parallel phrase, and *the gentle sex* can be replaced with a word like *women* or *females*, depending on the context.

## IV. The Study

### A. Study Design

To determine whether federal appellate judges are using gender-neutral language, my research assistant and I collected several kinds of data. First, we examined recent opinions authored by a larger sample of judges ("the Larger Sample") to determine whether they used gender-neutral pronoun pairs. Second, we read a smaller sample of those opinions ("the Smaller Sample") more closely, checking for instances of gender-neutral and gender-biased language. Third, we compared data from the years 1965 and 2006.<sup>155</sup> The methodology for each of these portions of the study is described below.

### B. Methodology and Findings

#### 1. The Larger Sample

##### a. Methodology

We collected data on the use of gender-neutral pronoun pairs in the opinions of federal appellate judges. We chose this group because it is a population of manageable size with notable influence in the legal field. For the Larger Sample, we identified all female judges, including senior judges, who were sitting on the United States courts of appeals in June 2007 and who had issued opinions in the previous

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152. Cooper, *supra* note 60, at 11.

153. *Id.* at 11–12.

154. See, e.g., LEClercQ, *supra* note 105, at 131; FAIR SPEECH PAMPHLET, *supra* note 98, at 5–6; MILLER & SWIFT, *supra* note 9, at 109–13; Chew & Kelley-Chew, *supra* note 5, at 677–78; Carolyn Korsmeyer, *The Hidden Joke: Generic Uses of Masculine Terminology*, in SEXIST LANGUAGE, *supra* note 42, at 122.

155. See *infra* notes 198–206 and accompanying text.

eighteen months that were available on Westlaw. We also included male judges, partly because studies in other populations have found that female participants were more receptive to inclusive language than males were,<sup>156</sup> and we wanted to see whether that held true for federal appellate judges. We therefore paired each female with a male judge from the same court whose birth date was closest to hers. We used birth dates because some previous studies have shown that age affects attitudes toward gender-neutral language, with older subjects being more receptive to it,<sup>157</sup> so we wanted a similar range of ages for each sex. We also thought that persons born around the same time were likely to have been exposed to similar societal attitudes about gender and language during their formative years. The 48 pairs constituted a total of 96 judges in the Larger Sample. In June 2007, the total number of active and senior federal appellate judges was 255.<sup>158</sup>

We gathered data through a Westlaw search of the federal court of appeals ("cta") database for opinions by the judges in our sample dated from January 1, 2006, through June 30, 2007. This yielded a total of 4721 opinions, which we searched for gender-neutral pronoun pairs *he or she*, *him or her*, and *his or her*.<sup>159</sup> We examined each instance of these phrases. If a phrase was part of a quotation or a close paraphrase from another source, we did not count it, because it did not represent a choice of wording by the judge being studied. We acknowledge that there was some gray area in making these determinations. For example, one lengthy and commonly cited immigration statute is written in gender-neutral language.<sup>160</sup> The drafters accomplished this principally through repeating nouns,<sup>161</sup> but the statute also includes some pronoun pairs.<sup>162</sup> Where a judge used a pronoun pair in referring to this statute, but not in a direct quotation, we made

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156. Parks & Robertson, *supra* note 15, at 233–34 (2004) (citing studies that "have consistently revealed that women are more supportive of nonsexist (inclusive) language than men"). Another study showed that subjects' attitudes toward women "partially mediate[ ] the gender effect on attitudes toward sexist language." *Id.* at 238.

157. See Parks & Robertson, *supra* note 11, at 402 (citing studies).

158. 496 F.3d at vii–xiv (listing then-current federal judges).

159. We also searched for each pronoun pair with the feminine pronoun first: *she or he*, *her or him*, and *hers or his*. But when we found only two instances of those pairs in the sample for the year 2006, we dropped it from our formulation. We also dropped the phrase *his or hers* because it was so infrequent.

160. 8 U.S.C. § 1231 (2000).

161. See, e.g., *id.* § 1231(a)(7)(A). ("[T]he alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien.").

162. See, e.g., *id.* § 1231(i)(3)(B)(iii) ("[A]t the time he or she was taken into custody . . .").

a judgment from the context whether that language should be attributed to the judge or to the statute's drafters.

## b. Results

After recording the data for each judge in the Larger Sample, we then expressed the subjects' use of gender-neutral pronoun pairs as percentages of the total number of opinions for each group, as shown in Table 1.

**Table 1. The Larger Sample—Occurrences of Gender-Neutral Pronoun Pairs in a Sample of Opinions Dated from January 1, 2006, to June 30, 2007**

Occurrences of:	Female Judges	Male Judges	Total Occurrences
<i>his or her</i>	201	174	375
<i>him or her</i>	26	19	45
<i>he or she</i>	141	116	257
Total Occurrences	368	309	677
Total Cases	2439	2282	4721
Percentage	15.09%	13.54%	14.34%

The Larger Sample covered 96 judges' use of gender-neutral pronoun pairs in 4721 federal appellate opinions. Initially, certain caveats about the data must be acknowledged. Paired pronoun use is only one method to avoid gender-biased pronouns; a writer may accomplish that end through various other methods. But those methods, described above,<sup>163</sup> are not easily discovered through computer searches. For example, when a noun is changed to the plural so the pronoun *they* is appropriate instead of a gendered singular pronoun, a computer cannot distinguish this use of *they* from others that are not related to gender neutrality. Nor can the computer identify more creative restructuring of syntax to avoid a gender-biased word choice. Moreover, many opinions do not include any generic pronoun references,<sup>164</sup> so they present little occasion to use either gender-biased or gender-neutral pronouns. These caveats make it plain that a tally of a judge's gender-neutral pronoun usage is not a dispositive measure of that judge's commitment to avoid gender bias. Still, the aggregate data in this study show a trend toward gender neutrality through

163. See discussion *supra* Part III.

164. See *infra* notes 179–182 and accompanying text.

many appearances of gender-neutral pronoun pairs. As Table 1 shows, we found 677 of these pairs among the 4721 cases we reviewed.

The degree to which individual judges used these pairs varied. Among the women, ten judges used no gender-neutral pronoun pairs, and the highest numbers of pronoun pairs appeared in the opinions of Judges Sonia Sotomayor (56), Maryanne Barry (38), and Sharon Prost (32). Among the men, ten judges used no gender-neutral pronoun pairs, and the highest numbers of pairs appeared in the opinions of Judges Eric Clay (47), Robert Sack (33), and Ronald Gilman (33).

In reviewing the pronoun pairs in the Larger Sample, we came across some phrasing that suggested judges had made conscious efforts to use gender-neutral language. In a case involving a male plaintiff, Judge Robert Sack added a bracketed *he or she* to a quotation, stating that a party requesting a preliminary injunction must show “that [he or she] will be irreparably harmed.”<sup>165</sup> The original source for the quotation used the word *it*.<sup>166</sup> Similarly, in one case, Judge Roger Gregory wrote “[his or her] discipline”<sup>167</sup> when the original source said “[the relevant] discipline.”<sup>168</sup> In another case, Judge Damon Keith said that a court need not “ask a defendant whether he or she understands” a waiver,<sup>169</sup> although the referenced rule did not include the pronoun pair.<sup>170</sup>

The data also show a small difference between younger and older judges. We divided the female and male groups in half by birth year<sup>171</sup> and found the use of gender-neutral pronoun pairs expressed as a percentage of total cases was slightly higher for the younger group (15.6%) than for the older group (14%). However, a linear probability model shows that this difference was not statistically significant as measured by the *t* test.<sup>172</sup> Likewise, the difference between the

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165. *Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 485 (2d Cir. 2007).

166. *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348–49 (2d Cir. 2003) (emphasis added).

167. *East Tenn. Natural Gas Co. v. 7.74 Acres in Wythe County, Va.*, 228 F. App'x 323, 328 (4th Cir. 2007).

168. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

169. *United States v. Broom*, 207 F. App'x 565, 569 (6th Cir. 2006).

170. *FED. R. CRIM. P.* 11.

171. Female judges in the older half were born in 1945 or earlier; male judges in the older half were born in 1943 or earlier.

172. The *t* test is a standard test that measures the statistical significance of data. A difference between two points of data is considered meaningful—statistically significant—if it is large enough that it is unlikely to be due to chance. *See* LLOYD JAISINGH, *STATISTICS FOR THE UTTERLY CONFUSED* 272, 274 (2000).



women and men as a whole (shown in Table 1) was not statistically significant. Among the subjects of this study, then, both younger and older judges and female and male judges used gender-neutral pronoun pairs to a statistically similar degree.

We did, however, find a significant difference among the circuits. As shown in Table 2, three circuit courts showed a statistically significant difference in the use of gender-neutral pronoun pairs. The judges in the samples from the Fifth and D.C. Circuits were significantly *less* likely to use gender-neutral pronoun pairs than were judges in the entire sample, while judges from the Second Circuit were *more* likely to use gender-neutral pairs.

**Table 2. Judges' Use of Gender-Neutral Pronoun Pairs, by Circuit**

Circuit	Coefficient	<i>t</i> Statistics
c1	-0.0698	-0.3983
c2	0.2210*	1.7697
c3	-0.0726	-0.5870
c4	-0.1858	-1.3898
c5	-0.2143*	-1.7071
c6	-0.0417	-0.3553
c7	-0.1571	-1.2543
c8	-0.2264	-1.2918
c9	-0.1499	-1.3431
c10	-0.2108	-1.6053
c11	-0.1948	-1.4896
FED	0.7139	0.9280
DC	-0.2223*	-1.6976

\* Statistically significant at the .10 level<sup>173</sup>

We also found a notable difference in the use of gender-neutral pronoun pairs between appointees of Democratic presidents and appointees of Republican presidents, as shown in Table 3.<sup>174</sup>

173. Significance was calculated using a student *t* table with 83 degrees of freedom.

174. In an effort to gather qualitative information about the study's data, we attempted to contact several judges and law clerks to ask about their policies. Most declined to talk with us, referring us instead to their published opinions. One female judge who did talk with me volunteered that she tries to "reflect the fact that the world is composed of persons of two sexes." Interview with Anonymous Federal Appellate Judge (Feb. 7, 2008) (notes on file with author). This particular judge will use the phrase *he or she* if she can do so gracefully, but if a sentence becomes tangled, she will use either *he* or *she*. We had recorded no gender-neutral pronoun pairs for her in the Larger Sample. Nevertheless, this judge indi-

**Table 3. Judges' Use of Gender-Neutral Pairs, Classified by Political Party of the Appointing President**

	Democratic Appointees	Republican Appointees
<b>Women</b>	Average: 9.42 N = 28	Average: 5.2 n = 20
<b>Men</b>	Average: 10.27 N = 22	Average: 3.19 n = 26

*Average numbers of gender-neutral pronoun pairs in the Larger Sample*

## 2. The Smaller Sample

### a. Methodology

The suggestions for writing gender-neutral language, discussed above in Part III, illustrate the varied choices available to a judge who wishes to avoid gender-biased language. Because some of those choices cannot readily be found by a computer, my research assistant and I read the Smaller Sample to check for them. We chose this subsection of the Larger Sample by listing each female judge by circuit and in alphabetical order within the circuit; we chose every eighth judge from this list, for a total of six female judges.<sup>175</sup> We then added the male judges we had previously paired with those women.<sup>176</sup> For these twelve judges (six pairs), we read the newest five opinions dated before June 30, 2007, that were shown on Westlaw as appearing in either the Federal Reporter or the Federal Appendix,<sup>177</sup> for a total of sixty opinions. We recorded all uses of gender-biased and gender-neutral language that we could identify. As with the Larger Sample, we did not count pronouns that appeared in quotations and close paraphrases from other sources. Making these determinations again in-

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cated that she was alert to the problem of gender bias. Gender neutrality may be reflected in her opinions in ways that we did not measure.

175. This Smaller Sample was comprised of Judge Jane Roth of the Third Circuit; Judge Priscilla Owen of the Fifth Circuit; Judge Diane Sykes of the Seventh Circuit; Judge Susan Graber of the Ninth Circuit; Judge Mary Beck Briscoe of the Tenth Circuit; and Judge Judith Rogers of the D.C. Circuit.

176. This Smaller Sample was comprised of Judge Walter Stapleton of the Third Circuit; Judge Carl Stewart of the Fifth Circuit; Judge Frank Easterbrook of the Seventh Circuit; Judge Richard Clifton of the Ninth Circuit; Judge Michael Murphy of the Tenth Circuit; and Judge Harry T. Edwards of the D.C. Circuit.

177. We did not include opinions identified on June 30, 2007, as "slip opinions," even though we recognized that they might later appear in the Federal Reporter or the Federal Appendix.

volved some gray area, because not all methods of eliminating gender-biased language are clearly identifiable.<sup>178</sup>

## b. Results

This reading illustrated an intuitive point: only some opinions present issues about gender-neutral language. An example of a case that did not is *United States v. Rankin*.<sup>179</sup> James Rankin had been convicted of manufacturing and transporting explosive materials, and the government's appeal was based on issues arising from his sentencing.<sup>180</sup> The opinion did not mention any general legal principles that included gendered pronouns, nor did it include any ready opportunities to use gender-biased nouns like *mailman*. The opinion's masculine pronouns referred to Rankin himself and were thus not gender biased.<sup>181</sup> Feminine pronouns referred to a female officer.<sup>182</sup> This is illustrative of the many opinions that contained neither gender-biased nor obviously gender-neutral language.

A writer does confront a choice about pronoun gender when using a pronoun in a general statement that refers to a person of unspecified sex. In such situations, the former convention was to use a male pronoun as a generic, as in this sentence: "A judge should keep order in his courtroom." A check for such gendered pronouns in the Smaller Sample revealed forty-three of them in general statements.

**Table 4. The Smaller Sample—Occurrences of Biased and Gender-Neutral Terms<sup>183</sup>**

n = 60 cases

Gender-Neutral Pronoun Use	Biased Pronoun Use	Generic Use of a Gendered Pronoun Fitting the Sex of a Relevant Person	Gender-Neutral Noun Use	Biased Noun Use
9	11	32	1	0

As shown in Table 4, thirty-two of the gendered pronouns occurred in statements that related to particular persons. Thirty of those

178. See Todd-Mancillas, *supra* note 70, at 113 (noting that it will not be obvious where a writer has consciously used a plural noun in order to use the plural "they").

179. 487 F.3d 229 (5th Cir. 2007).

180. *Id.* at 230–31.

181. *Id.*

182. *Id.* at 230.

183. The sixty opinions consisted of five recent opinions each by six female and six male judges. For further explanation, see *supra* notes 175–77 and accompanying text.

pronouns were masculine. For example, in a case involving a male defendant, Judge Priscilla Owen referred to the required analysis by stating, "a defendant cannot fail to invoke [certain] factors in support of his motion."<sup>184</sup> Two of the gendered pronouns were feminine, used by Judge Carl Stewart and Judge Harry Edwards to state general principles that applied to women.<sup>185</sup> Because of their close relation to actual persons in the cases, we did not classify these pronouns as clearly biased. Using a gendered pronoun this way—as part of a general statement that applies to a particular individual in the case—may be a reasonable way to use a third-person pronoun without suggesting that the masculine is the norm. We therefore classified these thirty-two occurrences separately.

We did find eleven clearly biased pronouns. Two were masculine pronouns in a general statement in *Decatur Ventures, LLC, v. Daniel*,<sup>186</sup> where Judge Frank Easterbrook stated, "[A] professional owes a duty of care only to his client plus any third party who the professional knows will see and rely on any opinion he renders."<sup>187</sup> As discussed above, it may be reasonable for a writer to express this kind of general principle with a pronoun of the same gender as a relevant person. However, the professional in question in *Decatur Ventures* was a woman.<sup>188</sup> We recorded this as gender-biased language.

A second example of biased pronouns appeared in a case concerning student transfers to other school districts.<sup>189</sup> Although there was no particular male student under discussion, in a single sentence Judge Mary Briscoe used masculine pronouns four times: "If a student transfers to a school district in which he is not a resident, he cannot compete in athletics for one year, unless the transfer is due to a bona fide change of residence by his parents, or he can demonstrate a legit-

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184. *United States v. Washington*, 480 F.3d 309, 317 (5th Cir. 2007).

185. *Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840, 843 (5th Cir. 2007) (stating, in a case where the plaintiff was a woman: "An employee merely alleging sickness as the reason for her absence does not automatically provide sufficient FMLA-notice."); *Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007) (stating, in a case where it was alleged that a woman was a supervisor: "[S]upervisory authority is not conferred on an employee merely by vesting her with a title").

186. 485 F.3d 387 (7th Cir. 2007).

187. *Id.* at 390.

188. *Id.*

189. *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1027 n.1 (10th Cir. 2007).

imate hardship.”<sup>190</sup> The controlling statute is written in gender-neutral language.<sup>191</sup>

We also looked for gender-biased nouns in the sixty cases, but the Smaller Sample was notably lacking in gender-biased terms like *mailman* or *founding fathers*. And as in the Larger Sample, we found instances where judges apparently intentionally framed points in gender-neutral language. In a case where a married couple petitioned for asylum, Judge Walter Stapleton used feminine pronouns in general statements; for example, “the alien must demonstrate that she is unwilling or unable to return to her home country . . . .”<sup>192</sup> Judge Priscilla Owen used the phrase *he or she* in a general statement about injured persons,<sup>193</sup> and Judge Judith Rogers used the pair *his or her*.<sup>194</sup> In another instance, in discussing whether expert testimony should be required on a certain point, Judge Harry Edwards mentioned what “lay persons” can appropriately be expected to know.<sup>195</sup> This is a gender-neutral counterpart for the term *laymen*, which was used (along with its singular form) in fifty-three federal appellate cases in 1965, as shown in Figure 1 and discussed below.

Other judges may have chosen to avoid gender-biased language in ways that we could not definitively identify. For example, in an opinion by Judge Jane Roth that concerned fiduciary obligations,<sup>196</sup> in several places she used the plural noun *fiduciaries*,<sup>197</sup> thus making a plural pronoun appropriate. Similarly, Judge Michael Murphy repeated the phrase *third party* several times, perhaps in order to avoid a gendered pronoun.<sup>198</sup> It seems likely that other judges avoided bias through deft phrasing that we could not detect.

Although the Smaller Sample produced numbers too small for meaningful statistical analysis, the low amount of biased phrasing in these cases suggests that many judges are framing their opinions in gender-neutral language. It further suggests that more blatantly bi-

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190. *Id.*

191. OKLA. STAT. ANN. tit. 70, § 8–103.2 (West Supp. 2006).

192. *Komarovas v. Attorney Gen. of the U.S.*, 219 Fed. App’x 207, 210 (3d Cir. 2007).

193. *Evans v. Ford Motor Co.*, 484 F.3d 329, 336 (5th Cir. 2007).

194. *Natural Res. Def. Counsel v. EPA*, 489 F.3d 1364, 1370 (D.C. Cir. 2007).

195. *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839, 846 (D.C. Cir. 2007).

196. *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 226 (3d Cir. 2007).

197. *Id.* at 233.

198. *United States v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007) (including phrasing such as, “[v]alid third party consent can arise either through the third party’s actual authority or the third party’s apparent authority”).

ased wording, like referring to the “delicacy” of women,<sup>199</sup> has now become rare or nonexistent in federal appellate opinions.

### 3. Changes Between 1965 and 2006

#### a. Methodology

We also examined whether judges’ use of gender-neutral language has changed over time. To examine this, my research assistant and I chose the year 1965 as a benchmark because it immediately preceded the late 1960s, when feminists in the United States began their movement for gender-neutral language.<sup>200</sup> We used the year 2006 for comparison because it was the last complete year at the time we collected the data. We conducted a computer search of all federal court of appeals cases for both years,<sup>201</sup> searching for opinions that included the same pronoun pairs we counted in the Larger Sample. We also counted cases using the less common phrases *himself or herself* and *herself or himself*, which we had not examined in the Larger Sample because of their infrequency, and cases from both years that used selected nouns, as shown in Figure 1 and Table 5.

Unlike our approach to the Larger Sample, we did not review each pronoun pair identified by this search; we simply recorded the gross number of cases that included gender-neutral pronoun pairs. We did, however, review occurrences of certain nouns that have different uses, some of them relevant and some not relevant to this study. We checked the references to *founders*, counting them only where the term referred to founders of the United States. We also checked uses of *mailman* and *postal worker(s)* and did not count cases where they appeared as parts of proper names, because those did not represent choices by judges.

#### b. Results

A comparison of 1965 opinions with those from 2006 shows a dramatic increase in the use of gender-neutral language over that period.

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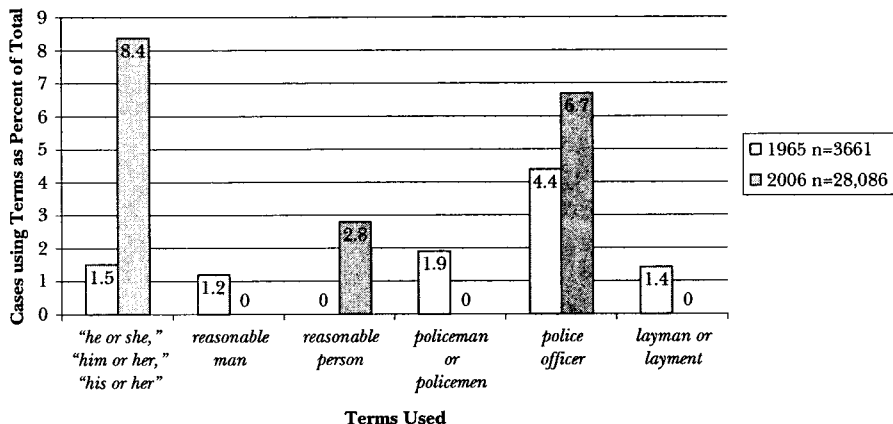
199. See discussion *supra* note 49 and accompanying text.

200. See CAMERON, *supra* note 22, at 9 (identifying “pressures to look at [gender-biased] language which arose, roughly, during the late 1960s and 1970s”); Betty Lou Dubois & Isabel Crouch, *Linguistic Disruption: He/She, S/He, He or She, and He-She, in WOMEN AND LANGUAGE IN TRANSITION* 28, 29 (Joyce Penfield ed., 1987) (“[B]y far the majority of writers before the 1970s did not worry about the use of pronouns.”).

201. Interestingly, the total number of opinions for 2006 varied slightly depending on the date when we checked the database. West’s research attorneys were unable to explain the cause of this difference. The totals reported for the year 2006 in this Article were recorded from searches conducted on November 20, 2007.

Between 1965 and 2006, the total number of reported cases from the federal courts of appeals increased from 3661 to 28,086,<sup>202</sup> or 667%. At the same time, use of the three gender-neutral pronoun pairs *he or she*, *him or her*, and *his or her* showed a much greater increase, from 55 to 2361, or 4192%. Figure 1 shows cases using the identified terms expressed as percentages<sup>203</sup> of the total number of cases.

Figure 1



On average, federal appellate judges in 2006 were much more likely than judges in 1965 to use these pronoun pairs. The difference was statistically significant at the 1% level.<sup>204</sup> Comparisons of noun phrases also show a trend toward gender neutrality.<sup>205</sup> The increase in use of the terms *reasonable person*<sup>206</sup> and *police officer* was statistically significant at the 10% level. In the same period, there was a proportional decrease in cases using the gender-biased terms *reasonable man* and *layman* and its plural *laymen*, which were significantly less likely to be used in 2006 than in 1965. This comparison was also made at the 10% level of significance.

202. The totals for both years include cases with no opinion attributed to a particular judge—for example, per curiam and memorandum opinions. We did not attempt to identify and separate such cases from the totals.

203. Some of the terms shown as occurring at the 0% level did appear a few times, but not enough to equal 1%.

204. Under a two-sample proportion test, the Z-score was equal to 26.50803.

205. We did not examine use of the term *reasonable woman*, because using that term is more than a linguistic choice. It reflects a different legal standard, which is outside the scope of this Article. For a discussion of the "reasonable woman" standard for sexual harassment, see Chew & Kelley-Chew, *supra* note 5, at 672–75.

206. This finding comports with Chew and Kelley-Chew's finding that, partly because of the debate over the legal standard, federal judges now use the term *reasonable person* (instead of *reasonable man*) 96% of the time. *Id.* at 672.

The other terms we compared occurred too infrequently for meaningful statistical analysis. But as Table 5 shows, the number of cases including the gender-biased terms *founding fathers* and *mailman*<sup>207</sup> or *postman* remained essentially static despite the large increase in cases. The gender-biased *mankind* increased modestly, but not in proportion to the overall increase in cases. Meanwhile, there were increases in the gender-neutral terms *founders*, *mail carrier*, *postal worker*, and variations of *lay persons*.<sup>208</sup> There were no instances of *founding mothers* in either year, and only one instance of *humankind*. Altogether, although the numbers in Table 5 are small, they suggest a trend toward gender-neutral language. At the same time, though, they show that biased language still continues to appear, indicating a need for continued progress.

**Table 5. Occurrences of Less Common Terms in Westlaw Search of 1965 and 2006 Federal Appellate Cases**

Terms	1965 Cases	2006 Cases
<i>himself or herself</i>	1	152
<i>herself or himself</i>	0	3
<i>mankind</i>	8	21
<i>humankind</i>	0	1
<i>founding fathers</i>	2	2
<i>founders</i> [of the United States]	1	9
<i>founding mothers</i>	0	0
<i>mailman or postman</i>	3	6
<i>mail carrier</i>	5	15
<i>postal worker</i>	0	31
<i>layperson, laypersons, lay person, lay persons, or lay people</i>	3	110
<b>Total number of cases</b>	<b>3661</b>	<b>28,086</b>

## Conclusion

Professionals in many fields recognize that gender-biased language makes women invisible and constructs an inaccurate world. While some commentators express concerns that gender-neutral language will be awkward or annoying, language experts identify graceful

207. The term *Mailman* appeared in some cases as a proper name. We did not include those cases in our total.

208. The term *Postal Worker* appeared in some cases as part of the name of a union. We did not include those cases in our total.



ways to surmount these obstacles. The use of gender-neutral language has increased in many fields, including the legal profession.

This Article began with a question: Are judges using gender-neutral language? This study's data answer that question: they are. Federal appellate opinions now include significantly more of it than in the benchmark year, 1965. Many federal appellate judges, both women and men, are taking care to choose gender-neutral language, thus bringing the law closer to its broad goal of being fair to all citizens. Since 1965, which predated the movement for gender-neutral language, the use of gender-neutral pronouns has increased significantly, as has the use of most of the gender-neutral noun phrases we examined.

Our data led us to an optimistic conclusion about federal appellate judges.<sup>209</sup> The dramatic increase in gender-neutral pronoun pairs since 1965 was robustly significant, and pronoun pairs are only one solution to the pronoun problem. Still, some biased nouns and pronouns continue to appear in the federal appellate opinions. Interestingly, we noted that appointees of Republican presidents used fewer gender-neutral pronoun pairs than Democratic appointees. These points suggest a continued need for consciousness-raising about gender-neutral language.

This study's data also suggest possibilities for further research. Future studies of federal appellate judges in the United States could document whether the trend toward gender-neutral language continues. Data from other American courts or from foreign courts would also lead to instructive comparisons.

Frames shift and adapt over time, and the potential for re-framing always exists. Judges can continue the trend away from gender-biased language, thus framing the law in a more inclusive way. Lawyers can assume a role in this effort. Both principles of fairness and a desire to win should prompt them to consider adopting inclusive wording. When they file documents with the federal courts of appeals, there is a good chance that their readers—whether female or male, judges or staff members—will be attuned to gender-neutral language. Biased language may be a cinder in the eye<sup>210</sup> to such readers, dimin-

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209. *But see* Chew & Kelley-Chew, *supra* note 5, at 668, 672 (concluding from an examination of noun phrases in various legal documents that progress toward gender-neutral language in the legal profession was disappointing, but noting that some "gender-neutral word options are now widely used in the legal community").

210. *Kaye, supra* note 3, at 2.

ishing a brief's effectiveness. If both judges and lawyers consciously shift their frames toward gender neutrality, their efforts will positively influence how litigants and the public look at gender and the law.